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Before the
FEDERAL COMMUNICATION COMMISSION
Washington, D.C. 20554

In re Matter of	)	
	)	
Implementation of the Local Competition Provisions	)	
in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	

REPLY COMMENTS OF PUBLIC SERVICE COMPANY OF NEW MEXICO

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Public Service Company of New Mexico
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SUMMARY

In its initial Comments filed in this docket on May 20, 1996, Public Service Company of New Mexico ("PNM") indicated a strong preference that the Commission resolve pole attachment disputes by adjudication. Adjudication will permit the Commission to consider specific facts at issue, and will preclude the need for the Commission to adopt detailed substantive rules affecting an industry with which it is unfamiliar. A broad crossection of commenters, including some telecommunications carriers, support this approach. Local exchange carriers, and not electric utilities, should be the primary focus of rules adopted in this docket.

Additionally, in the event that the Commission were to adopt detailed rules, PNM's Reply Comments oppose some of the more aggressive positions taken by telecommunications carriers. PNM's Reply Comments include the following positions:

1. The FCC should adopt a reasonable interpretation of what constitutes a "right-of-way." It should not include pathways into buildings for which electric utilities have no rights or limited rights, or rooftops of utility buildings.
2. The FCC rules should be consistent with state property law and state and local statutes and ordinances.
3. Electric utilities must be permitted to reserve capacity for reliability and future expansion, and cannot be forced to expand facilities solely to accommodate telecommunications attachments.
4. Nondiscrimination does not require electric utilities to be subject to the same terms and conditions of access for their own facilities as applied to telecommunications carriers.
5. Notice rules adopted by the Commission should accommodate reasonable electric customer service requirements.
6. Electric utilities should be permitted to adopt safety and engineering standards that are more stringent than national codes, provided that such standards are applied in a nondiscriminatory manner

7. The Commission should not adopt rules restricting the right of facilities owners to modify their facilities because normal market forces will prevent abuse.

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Public Service Company of New Mexico ("PNM") submits its reply comments pursuant to the Notice of Proposed Rulemaking ("NPRM") herein PNM's reply comments, as well as its initial comments, are directed towards and limited to the Commission's inquiries, NPRM ¶¶ 220-225, regarding nondiscriminatory access to electric utility companies' poles, ducts, conduits and rights-of-ways by telecommunications providers.

I. INTRODUCTION

In its initial comments, PNM urged the Commission to proceed cautiously in adopting substantive regulations affecting the electric power industry until it has sufficient experience and expertise to evaluate the impact that its rules might have on that vital industry and the consumers dependent upon it. Instead, PNM invited the FCC to rely on the well-developed principles of law that it and other federal agencies had developed over many years with respect to the meaning of the term "nondiscriminatory" in exercising jurisdiction over common carriers. Supreme Court

guidance in Securities and Exchange Commission v. Chenery[1/] endorses a cautious approach by agencies in exercising newly-conferred jurisdiction. This Commission initially declined to adopt any substantive rules relating to the reasonableness of non-price terms and conditions for utility pole attachments until it had gained additional experience and expertise.[2/] PNM brought to the Commission's attention the diverse factual situations which would be difficult, if not impossible, for the Commission to anticipate and cover by general rule. PNM urged the Commission initially to resolve by adjudication under its complaint rules any access and attachment issues which the parties were unable to resolve through negotiation.

In the event that the Commission were to elect to adopt detailed rules, PNM made recommendations in response to the agency's specific questions in the NPRM:

1. Affiliates of electric utility facility owners should be afforded access on the same terms as third-party telecommunications carriers, but encumbering access of utility owners to their own facilities would be disruptive of the utilities' obligations to their electric customers and contrary to the public interest.
2. In considering access to facilities by telecommunications carriers, the Commission should take into account existing available capacity (whether it be wire or wireless) already attached to the utility's facilities and whether there is a need for additional capacity.
3. The Commission should defer to state regulation and local zoning ordinances in considering access to utility facilities and ensure that the attaching parties are responsible for all related fees and all other costs associated with modifying the use of existing facilities for the benefit of an attaching party.
4. The Commission must preserve third-party property rights in considering access to facilities located on property to which the electric utility has an easement or license.

1/ 332 U.S. 194 (1947).

2/ See Adoption of Rules for The Regulation of Cable Television Pole Attachments, First Report and Order, 68 F.C.C. 2d 1585, 1590 (1978); Adoption of Rules for The Regulation of Cable Television Pole Attachments, Second Report and Order, 72 F C.C. 2d 59, 72-75 (1979).

5. The maximum number of possible attachments to poles, and the capacity of ducts, conduits, and rights-of-way, should be determined on an engineering basis by reference to applicable engineering codes, and the electric utility must be able to reserve capacity for its own projected expansion needs.

6. Excess capacity on electric utility facilities should be allocated on a first-come, first-served basis, with restrictions on warehousing capacity by a telecommunications carrier to impede competition.

7. Electric utilities should have wide latitude to determine what constitutes valid safety, reliability, or generally-applicable engineering purposes under Section 224(f)(2). Electric utilities should bear the burden of proof but their engineering analyses should be considered a rebuttable presumption

8. The Commission should require compliance with the National Electrical Safety Code and structural integrity requirements

9. Notice to attaching entities by an electric utility of its intention to modify a facility should be given by first class mail, postage prepaid, ten days in advance. Notice provisions in existing agreement should continue to be effective between parties to those agreements. The Commission should establish a five-year grace period for validation of pole attachment databases

10. Telecommunication carriers should be prohibited from making any attachments without first obtaining the facility owner's concurrence.

11. Make-ready costs should be shared by the number of attaching entities that elect to add to or to modify their attachments Costs should not be offset by potential revenue increases. The FCC should not restrict the facility owner's right to modify its facilities

II. ELECTRIC UTILITIES SHOULD NOT BE THE PRIME FOCUS OF NPRM; NOR SHOULD THEY BE SUBJECT TO DETAILED REGULATION TO THE DETRIMENT OF ELECTRICITY USERS

Congress has given the Commission a short deadline in which to adopt rules and policies in this proceeding to promote telecommunications competition. Accordingly, the FCC should focus on the most pressing issues within the core telecommunications industry where it has great expertise. The FCC should not be diverted into peripheral areas where it has little experience, such as the electric utility industry.

AT&T stated succinctly why the Commission should focus upon the local exchange carriers ("LECs") rather than upon the electric utilities

> "[I]t is important to emphasize that Section 224(f)(2) draws a distinction between 'utilities providing electric service' and all other utilities (including LECs). Section 224(f)(2) expressly provides that 'utilities providing electric service' may deny access for reasons of 'insufficient capacity' or for 'safety, reliability, and engineering purposes'; it conspicuously declines, however, to offer such grounds for refusal to incumbent LECs (or any other nonelectric utility). The Commission should clarify that the Act does not permit utilities other than electric utilities to deny telecommunications carriers access to pathways because of insufficient capacity."[3/]

MCI agrees that the Commission should focus upon the LECs.[4/] Winstar notes that although Section 224 covers electric and other utilities, "Winstar is primarily concerned with access to LEC roofs and conduit[s] and has focused its comments accordingly."[5/]

On the other hand, commenters seeking detailed regulation of poles, ducts, conduits and rights-of-way, without distinguishing between electric utilities and LECs, have perhaps unwittingly underscored the dangers to utilities and their customers that would result from any such detailed regulation. For example, TCG would require utilities to grant access to their facilities "in thirty days or less,"[6/] to refrain from modifying their own facilities "more than one time in any two year period,"[7/] and to make no such modifications without an advance "twelve

3/ Comments of AT&T, 16-17

4/ Comments of MCI, 21-25

5/ Comments of Winstar Communications, Inc., n 6

6/ Comments of Teleport Communications Group Inc ("TCG"), 9.

7/ Id. at 10.

months" notice period.[8] TCG's proposals, if literally adopted, would wreak havoc with electric utilities and their customers. Electric utilities must not be inhibited from making emergency or pre-scheduled modifications to their facilities in order to meet their public service obligations. Nor should the utilities be stampeded into permitting 30-day attachments without time to investigate the safety and reliability consequences of any such attachments.

III. A BROAD CROSS-SECTION OF COMMENTERS SUPPORT PNM'S POSITION THAT DETAILED REGULATIONS ARE UNNECESSARY

A large number of organizations representing diverse viewpoints filed comments discussing pole attachments. Broadly categorized, these commenters fell into the following categories: (1) national interexchange carriers (IXCs); (2) local exchange carriers (LECs); (3) governmental bodies; (4) competitive access providers (CAPs) and cable television (CATVs); and (5) electric utilities. CAPs and CATVs took the most militant positions on access to utility infrastructure. PNM disagrees with many of the positions espoused by these entities.

However, a large number of commenters, including LECs, utilities, and one IXC and CAP, agreed with PNM's recommendation that the Commission take a cautious approach to adopting substantive rules. Frontier indicates that the terms of Section 224(f)(2) are relatively self-explanatory, recommending that the Commission only ensure that the utility's reasons for denial of access be keyed to its electric service business.[9] Sprint recommends that insufficient capacity claims be examined on a case-by-case basis. adoption of no specific standards governing

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[8] Id.

[9] Comments of Frontier Corporation, 7.

safety and reliability, and delay all of cost allocation rules until the FCC gains more experience over the next few years.[10/] A coalition of rural telephone companies recommends that the Commission adopt no detailed rules regarding denial of access to poles, conduits, and rights-of-way.[11/] Many Regional Bell Operating Companies and electric utility commenters recommend that the Commission not adopt specific rules at this early stage.[12/]

The entire thrust of the 1996 Act is less not more regulation -- a concept which Section 224 recognizes in its explicit preference for negotiated, rather than regulatory, pole attachment solutions.[13/] The Commission should follow the advice of the electric power industry and other thoughtful commenters and adjudicate access issues until it has the knowledge and experience to adopt regulations that make sense for both the electric and telecommunications industries, and their users.

[10/] Comments of Sprint Corporation, 16-18

[11/] Comments of the Western Alliance on Dialing Parity and Access to Poles, Conduits, and Rights of Way, 4

[12/] See, e.g., BellSouth Comments, 13-14; Comments of U S West, Inc, 15 ; Comments of SBC Communications, Inc. , 14-15; Comments of GTE Service Corporation , 22 ; Further Comments of Bell Atlantic, 14 ; Comments of Pacific Telesis Group, 17; Comments of Delmarva Power & Light Company, 3; Joint Comments of UTC and The Edison Electric Institute (passim) ; Comments of PNM Company, 4-8; Comments of Duquesne Light Company, 3; Comments of Virginia Electric and Power Company, 4-6 ; Comments of American Electric Power Service Corporation et al., 19; Comments of the People of California et al., 6 (recommending that the FCC defer rulemaking on Section 224(f) and (h) to deal with all pole attachment issues comprehensively)

[13/] See 1934 Act § 224(e)

IV. RESPONSES TO SPECIFIC COMMENTS

A. The Commission Should Adopt a Reasonable Interpretation of What Constitutes a "Right-of-Way"

A number of commenters urge the Commission to take an expansive view of what constitutes a "right-of-way." Typical among these are pleas for the Commission to include building access points, risers and lateral conduits in multiunit premises, telephone vaults and closets, and so forth.[14/] PNM interprets these comments to refer specifically to pathways utilized by LECs, and takes no position as to whether the Commission should include them within the definition of "rights-of-way." In general, electric meters are located on the exterior of buildings (even on the exterior of most multiunit buildings). Ownership and control of electric wiring on the customer's side of the meter belongs to the customer and not to the electric company. In most instances, the electric utility neither owns nor controls the cable entranceway into buildings. In those few instances in which PNM does have its facilities inside of a building owned by a third party, the building owner has granted an easement which permits the placement only of electrical distribution equipment (step-down transformers, etc.). PNM's legal rights in these circumstances do not permit it to allow another company to colocate telecommunications facilities. Moreover, the confined nature of the space utilized for these purposes presents a significant electrical safety hazard to telecommunications carriers who are not trained in working near high-voltage equipment. Certainly the expansive definition of "rights-of-way" urged by certain commenters would be factually incorrect or inappropriate if applied to electric utility infrastructure.

[14/] See, e.g., Comments of GST Telecom, Inc., 1; Comments of MFS Communications Company, Inc., 9; Comments of AT&T, 14.

In a unique comment, Winstar insists that the term "right-of-way" includes the right to install microwave towers with one or more antenna dishes on the roofs of buildings.[15/] In fairness to Winstar, it primarily bases this assertion on the LEC collocation provisions of the 1934 Act, § 251(c)(6), rather than on the pole attachment provisions of § 224(f).[16/] To the extent that Winstar bases its assertion on Section 251(c)(6), PNM takes no position. However, Winstar also seems to base its rooftop claim on Section 224(f)(1).[17/] This claim is erroneous insofar as electric utilities are concerned. The term "right-of-way" in electric utility usage is quite limited, and refers to a specific pathway, often by grant of easement over the property owned by others, for specific outside plant transmission and distribution conductors. The term does not include any utility buildings -- even power plants. Neither Section 224 nor its legislative history would suggest that Congress intended the term "right-of-way" to be any more inclusive than its usual usage. If the Commission were to adopt Winstar's position regarding rooftop access, it should reject Section 224(f)(1) as the legal basis for that decision and explicitly indicate that such access is solely predicated on the LEC collocation provisions of Section 251(c)(6).

15/ Comments of Winstar, 4-5.

16/ Id. at 4.

17/ Id. at 5.

B. FCC Rules Should be Consistent With Property Law and State and Local Statutes, Regulations, and Ordinances

PNM pointed out in its initial comments, that many rights-of-way are used by utilities under restrictive easements which may not permit the utility to grant third-party access, and that various State statutes and local ordinances lawfully regulate the placement and use of poles, ducts, conduits, and rights-of-way. A number of the telecommunications commenters insist that the 1996 Act provides the Commission with unlimited authority to order attachments on both public and private property.[18/] Significantly, none of the carriers insisting on broad, mandated access addresses the applicability of property law or State statutes or local ordinances.

With respect to public right-of-way, the Commission should be aware that most public right-of-way is granted by states and their political subdivisions to individual named utilities. In these instances, an electric utility is without lawful authority to grant use of its right-of-way to telecommunications carriers. The telecommunications carrier (and not the electric utility) should be responsible for obtaining a franchise from the government entity concerned for colocation of telecommunications plant on public right-of-way utilized by electric utilities.

With respect to the applicability of property law, the Fifth Amendment takings clause constitutes the upper limit of Commission jurisdiction. The takings implications of the 1996 Act were discussed in great detail by some commenters.[19/] PNM endorses those comments and

[18/] See, e.g., Comments of NEXTLINK Communications, 4-5; (stating 1996 Act creates a "fundamental right" of access to "public and private properties"); Comments of General Communication, Inc., 3

[19/] See, e.g., Infrastructure Owners' Comments, 7-10

requests the Commission to consider carefully the extent to which its authority under Section 224(f)(1) is circumscribed by the Fifth Amendment.

None of the telecommunications commenters addressed the effect of State statutes and local zoning ordinances on the Commission's authority to order access to utility poles. No commenter argues that Section 224 provides FCC authority to preempt such State and local laws. Indeed, Section 704 of the 1996 Act adds Section 332(c)(7) to the 1934 Act, entitled "Preservation of Local Zoning Authority," which permits preemption of such authority for the siting of wireless antennae only with respect to the environmental effects of radiofrequency emissions.[20/] Moreover, the 1996 Act specifically affirms the authority of State and local governments to regulate access to public rights-of-way and to charge reasonable and nondiscriminatory fees for their use.[21/] The Commission should be mindful of State and local regulatory authority in formulating its rules and policies.

C. Electric Utilities Must Be Permitted To Reserve Capacity For Reliability and Future Expansion, and Cannot Be Forced to Expand Facilities Solely to Accommodate Telecommunications Attachments

A number of telecommunications carriers advocate a rule prohibiting electric utilities from reserving capacity on their facilities for reliability purposes or future expansion of their electric service,[22/] or propose significant limitations on a utility's ability to do so.[23/]

[20/] See 1996 Act § 704(a) (adding § 332(c)(7)(B)(iv) to the 1934 Act).

[21/] See 1996 Act § 101(a) (adding § 253(c) to the 1934 Act) and § 704(c).

[22/] See, e.g., NEXTLINK Comments, 5-6; Comments of American Communications Services, Inc., 8.

[23/] See, e.g., Comments of the Association for Local Telecommunications Services, 8 (urging

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The Commission should reject these views. The Commission must recognize that utilities justifiably relied upon the regulatory scheme in effect for the past seventeen years in planning the distribution systems that currently exist. Under the pole attachment regulatory scheme enacted in 1978, electric utilities had the absolute right to bar attachments to their infrastructure.[24/] Thus, electric utilities were secure in the knowledge that they could ensure retention of sufficient reserve capacity for reliability and future expansion. Accordingly, electric utilities designed their infrastructure capacity to meet their own needs; capacity for attachments would be provided only to the extent that the standard size of the facility had more capacity than was required for utility needs.[25/] State regulators would certainly not permit the capital costs of facilities a utility might wish to deploy with further excess capacity, to be recovered through its electric rates if excess capacity were installed only on speculation that additional revenue would be realized from future attachments.[26/]

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that capacity reservations be permissible only if "presented to and approved by the relevant state authority"); GST Comments, 5-6 (utilities should be permitted to reserve space on facilities only if "they provide the same opportunity for future expansion to all other future users of the facility on a nondiscriminatory basis"); MFS Comments, 10-11 (same); AT&T Comments, 16 (urging prohibition of reservation of capacity except for near term -- one year or less -- requirements); Comments of MCI, 23 (urging disallowance of any capacity reservation unless the utility had "specific plans to utilize that space before the interconnecter requested access").

[24/] See FCC v. Florida Power Corp., 480 U.S. 245, 251-52 (1987) (holding Section 224 "provides no explicit authority to the FCC to require pole access for cable operators").

[25/] For instance, even if a utility needed only five feet of capacity on a given pole run, it might nevertheless have to install 35-foot distribution poles due to minimum safety requirements, thus providing several feet of excess capacity for use by attaching entities.

[26/] The Commission should also recognize that it is only within the past very few years that the

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Under the scenario advocated by many telecommunications carriers, this reserve capacity could be quickly appropriated by telecommunications carriers. Then, when the forecast future electrical load requirements materialize, the electric utility and its customers would be forced to invest in additional infrastructure to serve that additional load. If the facilities concerned are underground ducts or conduit, this capital expense (which will be borne at replacement rather than embedded cost) will be especially burdensome. If the infrastructure consists of poles, Section 224(i) could add insult to injury if it were to be interpreted as requiring the utility also to bear the cost of transferring telecommunications attachments from the old poles to the new poles, notwithstanding that the presence of telecommunications attachments caused the need for taller poles in the first instance.

Closely related to the capacity reservation issue is the assertion by several telecommunications commenters that the 1996 Act requires utilities to expand their facilities if existing infrastructure capacity is insufficient to serve the needs of all.[27/] In this instance, as AT&T properly notes, the Act may distinguish between incumbent LECs (to which Section 224(f)(2) does not apply) and electric utilities (to which Section 224(f)(2) does apply).[28/] PNM takes no position as to whether the Act requires incumbent LECs to expand their facilities to

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possibility of such additional attachments could reasonably have been anticipated, because in earlier years neither LECs nor CATVs faced competition from alternate telecommunications carriers.

27/ See, e.g., NEXTLINK Comments, 6 (FCC should require expansion of facilities and "sharing" of the associated costs).

28/ See AT&T Comments, 6

accommodate competing telecommunications carriers. However, PNM agrees with AT&T's analysis that the 1996 Act does not require electric utilities to expand their facilities to accommodate telecommunications attachments. To hold otherwise would directly contradict the clear and unambiguous language of Section 224(f)(2) that an electric utility "may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights of way, on a nondiscriminatory basis where there is insufficient capacity . . . ."

The Commission should not countenance the manifestly unjust results that would flow from accepting the arguments of telecommunications carriers that utilities should not be permitted to reserve capacity on their own facilities or that they must construct additional facilities solely to accommodate telecommunications attachments. If the Commission were to require either action, it would cause an unequivocal and unjust subsidization of the attaching carriers by utility customers (if state commissions permit the recovery of such costs in electric rates) or utility shareholders (if they do not).

D. The Principles of Nondiscrimination Do Not Require Electric Utilities and Telecommunications Carriers To Be Subject To Identical Attachment Terms and Conditions

A number of commenters state that nondiscriminatory access means that both pole owners and their affiliates should be subject to the same attachment terms and conditions as third party telecommunications carriers.[29/] As stated in its initial comments, PNM agrees that nondiscrimination principles require comparable attachment terms and conditions for

[29/] See, e.g., GCI Comments, 3; Comments of Telecommunications Resellers Association, 13; Comments on Pole Attachment Issues by Joint CATVs, 18; Comments of Citizens Utilities Company, 3; Comments of Time Warner Communications Holdings, Inc., 13; ACSI Comments, 7; MCI Comments, 21; Sprint Comments, 16.

telecommunications affiliates of electric utilities if they sell telecommunications directly or indirectly to the public. In fairness to these telecommunications commenters, PNM notes that most addressed the requirement for parity with the pole owner in the context of an incumbent LEC rather than in the context of an electric utility. PNM recognizes that the Commission may determine that establishment of a level playing field for all competing LECs may require close scrutiny with respect to the parity of terms and conditions of access and imputation of equivalent pole attachment rates in local exchange telephone rates. PNM takes no position on the issue of nondiscrimination as it relates to terms and conditions applied to LEC pole owners and competing telecommunications carriers. However, the Commission should recognize that no such competitive concerns would justify requiring a utility pole-owner to apply the same terms to itself as it does to third-party carriers. So long as the electric utility does not unreasonably discriminate[30/] with respect to terms and condition among similarly-situated telecommunications carriers, the nondiscrimination principles enacted in Section 224(f)(1) are satisfied.

30/ There are valid reasons to require different terms and conditions. For instance, attachment of a 900-pound wireless antenna array presents different operational and potential liability problems, requiring greater contractual protection of the pole owner and the public, than attachment of a simple single coaxial cable television cable.

E. Any Notice Rules Should Accommodate Reasonable Customer Service Requirements

Several telecommunications carriers request the Commission to adopt notification rules under Section 224(h) that would significantly impede electric utilities from conducting their business in a reasonable fashion. For instance, some carriers demand minimum notification periods between 60 days and twelve months.[31/] Other carriers suggest that "reasonable notice" be defined as notice which allows a carrier to prevent disruption of its network without financial burden.[32/] Time Warner insists that the utility must not only provide notice, but provide notice to a specific individual.[33/]

Adoption of these various suggestions would unjustifiably infringe on the electric utility's right to conduct its own business. Whatever notice period the Commission adopts will necessarily impose at least that much delay in the process of providing electrical service to new customers. Neither customers nor State commissions will tolerate built-in delays of two, three, six or twelve months between a customer's service order and its completion.[34/] Moreover, when facilities must be moved to accommodate public improvements (e.g., widening a street), the utility may not itself have even as much as two months notice. Imposing a rule as suggested by GST and Winstar --

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31/ See, e.g., Comments of TCG, Inc., 22 (CC Docket No. 96-98 May 20, 1996) ("no less than twelve months"); GCI Comments at 4 ("at least 6 months"); GST Comments, 7 (60 days); MFS Comments, 11-12 (90 days); Joint CATV Comments, 20 (60-90 days); Time Warner Comments, 15 (90 days).

32/ See GST Comments at 7; Winstar Comments, 7-8

33/ Time Warner Comments, 15.

34/ Indeed, wireless telecommunications carriers during their initial buildout may submit new electric service applications for cell sites and expect that service to be available within a fortnight (or less)

that notice be considered reasonable only if the telecommunications carrier can avoid network disruption without "undue" cost -- would make the electric utility a hostage to the carrier's network engineering, however inefficient it might be. If the carrier elected to build in network redundancy, the standard could be met. If it did not design sufficient network redundancy, the utility would be handcuffed. Time Warner's suggestion that the utility be subject to a requirement to maintain an accurate organization chart of all attaching entities is clearly overreaching.

Frontier offers cogent advice. Notification is not currently a problem, so do not make it become a problem by enacting strict notice rules. Permit the parties to negotiate the terms of notice in their occupancy agreements, subject only to the requirement that all users be notified at the same time.[35/] This makes sense and is a workable solution. The Commission can adjudicate any disputes as they arise using the complaint process.

F. Utilities Should Be Permitted to Adopt Safety and Engineering Standards That Are More Stringent Than National Codes, Provided That Such Standards Are Applied in a Nondiscriminatory Manner

Several commenters suggest that safety standards adopted by utilities that are more stringent than national engineering standards (such as the National Electrical Safety Code) should be deemed per se unreasonable.[36/] PNM agrees that national engineering codes should generally provide a good basis for safety, engineering, and reliability standards. However, these national codes do not take into account local conditions (e.g., wind load, ice load, etc.) that could exceed environmental conditions postulated in national codes. Local tort law may have imposed on the

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[35/] Frontier Comments, 7.

[36/] See, e.g., GST Comments, 6; MFS Comments, 11; Joint CATV Comments, 17-18; Time Warner Comments, 4; ACSI Comments, 8.

utility a standard of care in excess of that specified in the relevant code, particularly if similar accidents have recurred at one location or under similar circumstance (thus putting the utility on notice of the potentially dangerous condition). Moreover, occupational health and safety rules imposed by federal or state authorities, or the terms of collective bargaining agreements or agreements with construction contractors, may require more stringent standards. If the Commission adopts any safety, reliability, or engineering standards, they should be minimum not maximum standards. Utilities should be free to adopt more stringent standards, provided those standards are applied in a nondiscriminatory manner

Closely related to this issue is whether the utility or the carrier seeking attachments should have the burden of proof as to safety, reliability, capacity, and engineering issues. PNM agrees with other utilities that carriers should be required to present a prima facie case that the utility's denial is unreasonable.[37/] Communications carriers are generally of the opposite opinion. The Commission should note that this argument is largely rhetorical. In the real world of poles and conduits, whether a denial is reasonable will in most cases be self-evident. Both the attaching carrier and the utility will put on its best factual case in an FCC complaint proceeding, because neither party could afford to rest on its evidentiary presumption and hope that the Commission would rule that the other party has failed to carry its burden. The burden of proof will only make

37/ Utilities stated this result in several ways. UTC/EEI and others indicated simply that the telecommunications carrier should have the burden of proof. PNM and others indicated that the utility would carry the ultimate burden of proof, but that its position would have the benefit of a rebuttable presumption of correctness. With the utility having the benefit of a rebuttable presumption, the carrier would have the burden of proving a prima facie case of unreasonableness -- shifting the ultimate burden back to the utility. However stated, the practical result is the same.

a whit of practical difference in those relatively few cases in which no clear-cut result is self-evident. The most important practical result of formally assigning utilities the burden of proof would be that an extra round of pleadings will be required with respect to capacity, safety, reliability and engineering issues, increasing the cost of complaint proceedings and increasing the administrative burden on the FCC staff.[38/] The Commission should retain its present procedural framework.

G. Normal Market Forces Will Prevent Facilities Owners From Making Unnecessary Modifications

Many carrier commenters argue that the Commission should adopt rules restricting the right of facilities owners from making modifications to their own property.[39/] Section 224 does not give the Commission explicit authority to adopt regulations preventing facilities owners from modifying their own facilities. Moreover, Section 224(i) imposes a heavy financial penalty on facilities owners who would make unnecessary modifications to their facilities, because they would be unable to collect any of the cost of those modifications from attaching entities. Finally, adoption of regulations of the sort apparently contemplated by the NPRM would engulf the Commission in an unnecessary and unending morass in which it would be required continually to refine the definition of what constitutes an "unnecessary" or "unduly burdensome" modification.

[38/] In normal process, the complainant carrier generally has the burden of proof, and will submit its complaint, which the utility will answer. The complainant gets the "last word" by way of a reply brief. If the burden of proof on capacity, safety, reliability, and engineering issues is formally shifted by Commission rule to the utility, Commission pleading rules would permit the utility to submit a surrebuttal brief as to those issues on which it has the burden of proof.

[39/] See TCG Comments, 10; Winstar Comments, 8; MCI Comments, 25 (owner should have burden of proof to demonstrate before FCC or state commission that modifications are necessary).

The best course for the Commission is not to adopt any rules limiting the right of facility owners to modify their own facilities. Congress clearly intended in Section 224(i) to let market forces accomplish that result. The Commission, at a minimum, should allow sufficient time to see if this economic disincentive system will prevent the abuses which the Commission apparently seeks to prevent by rule. If future complaints show that unnecessary or unduly burdensome modifications are truly a problem, the FCC could adopt rules targeted at the specific abuses.

V. CONCLUSION

The Commission should be cautious in adopting detailed rules applicable to the electric utility industry for the reasons set forth in PNM's suggestions in its initial and reply comments

Respectfully submitted,

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June 3, 1996

CERTIFICATE OF SERVICE

I, Carri M. Pizzuto, do hereby certify that a true and correct copy of the foregoing document was sent by first-class mail, postage prepaid, or hand-delivered, on this 3rd day of June, 1996, to the following persons:

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